No. 20,844

IN THE

United States Court of Appeals

For the Ninth Circuit

)ARRELL ZWANG and ELODYMAE ZWANG,
Appellants,

vs.

TEWART L. UDALL, as Secretary of the Interior of the United States of America,
Appellee.

On Appeal from the United States District Court for the Southern District of California, Central Division
Honorable E. Avery Crary, Judge

BRIEF FOR APPELLANT

RAME & COURTNEY,
330 North Fifth Street,
P. O. Box 895,
Coalinga, California,
Attorneys for Appellants.

INAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Regulations

Texts

No. 20,844

IN THE

United States Court of Appeals

For the Ninth Circuit

DARRELL ZWANG and ELODYMAE ZWANG,
Appellants,

vs.

STEWART L. UDALL, as Secretary of the Interior of the United States of America,
Appellee.

On Appeal from the United States District Court for the Southern District of California, Central Division
Honorable E. Avery Crary, Judge

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on February 23, 1966, by the United States District Court for the Southern District of California, Central Division, dismissing appellant's complaint. The underlying action is one in the nature of mandamus to compel the Secretary of the Interior to issue patents to appellants, as entrymen under the Desert Land Entry Act. (43 U.S.C. § 321, et seq.) Jurisdiction of the District Court was invoked under 28 U.S.C. § 1361. Appellants

filed a timely notice of appeal following the entry of the judgment of the District Court. (R. 59.) This Court's jurisdiction rests upon 28 U.S.C. §1291.

STATEMENT OF THE CASE

Appellants seek patents for two desert land entries in Riverside County, California. Appellants rely on the provisions of 43 U.S.C. § 1165. They contend that after the lapse of two years from the date of issuance of receipts upon filing final proofs, there was no "pending contest or protest" against their entries, and therefore they are entitled to patents.

The facts were stipulated to at the Pre-Trial Conference and are as set forth in the Pre-Trial Order (R. 20):

> A. Desert land entries comprising 320 acres each in the N½ and the S½ Sec. 19, T. 4S., R. 16 E., S.B.M., an oversize section in Riverside County, California, were allowed January 6, 1955, and subsequently assigned to appellants, the Zwangs, who are husband and wife.
>
> B. Final proofs were submitted on May 17, 1961. The register's receipt is dated May 29, 1961.
>
> C. By decision dated May 8, 1962, the Land Office at Riverside rejected the final proofs. (Exh. A.)
>
> D. The Zwangs appealed to the Director, Bureau of Land Management.

E. On October 10, 1962, the Division of Appeals, Office of the Director, reversed the decision of the Land Office and remanded the cases to the Land Office for further consideration. (Exh. B.)

F. On April 3, 1963, the Land Office accepted the final proofs for 80 acres in each entry and cancelled the entries as to the remaining lands. (Exh. C.)

G. The decision of April 3, 1963, was made by the Land Office *ex parte,* without a hearing and without prior notice to the Zwangs. A hearing was not waived by the Zwangs. The decision of April 3, 1963, was made by the Land Office based upon the records and documents contained in its files.

H. The Zwangs appealed again to the Director, Bureau of Land Management, and requested a hearing. On October 23, 1963, the Division of Appeals, Office of the Director, denied the Zwangs' request for a hearing and modified and affirmed the decision of the Land Office. (Exh. D.)

I. The Zwangs then appealed to the Secretary of the Interior, who issued his decision on February 3, 1965. (Exh. E.)

J. At the time the Zwangs filed their complaint herein, no contest within the framework of 43 C.F.R. 1852.2-2, had been filed. None has been filed since.

K. The Zwangs have not received patents for their entries.

L. The Zwangs' request for patents covering 320 acres on each entry was denied by the Land Office on March 5, 1965. (Exh. G.)

M. Appellee Stewart L. Udall is the Secretary of the Interior.

The February 3, 1965, decision (Exh. E) "set aside" the earlier decisions and remanded the case "for the initiation and prosecution of a contest".

There were no facts to be litigated at trial, and the only issues involved were and are questions of law.

The District Court entered judgment dismissing appellants' complaint (R. 57), having concluded that it was "without jurisdiction to determine whether the action of the Land Office on April 3, 1963, constituted a protest". (R. 53.)

This appeal followed.

STATUTES AND REGULATIONS INVOLVED

1. 43 U.S.C. § 1165 provides in pertinent part:

"* * * That after the lapse of two years from the date of the issuance of the receipt of such officer as the Secretary of the Interior may designate upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under the Act of March 3, 1891, and when there shall be no pending contest or protest against the validity of such entry, the en-

tryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; * * *."

2. 43 C.F.R. § 1852.2 provides in pertinent part:

"§ 1852.1 Private contests and protests.

"§ 1852.1-1 By whom private contest may be initiated.

Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the act of May 14, 1880, as amended (43 U.S.C. 185), or the act of March 3, 1891 (43 U.S.C. 329), may initiate proceedings to have the claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations in the subpart.

"§ 1852.1-2 Protests.

Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances."

3. 43 C.F.R. § 1852.2 provides in pertinent part:

"§ 1852.2 Government contests.

"§ 1852.2-1 How initiated.

The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim."

4. C.F.R. § 1862.6 provides:

"§ 1862.6 Patent to issue after 2 years from date of manager's final receipt.

"(a) The decision of the Supreme Court of the United States in *Thomas J. Stockley et al., appellants, v. the United States,* decided January 2, 1923 (260 U.S. 532, 67 L. ed. 390) holds that after the lapse of 2 years from the date of the issuance of the 'receiver's receipt' upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, such entryman is, there being no pending contest or protest against the validity of such entry, entitled to patent under the proviso to section 7 of the act of March 3, 1891 (26 Stat. 1098; 43 U.S.C. 1165), regardless of whether or not the manager's final certificate has issued.

"(b) The Supreme Court of the United States in *Payne v. U. S. ex rel. Newton* (255 U.S. 438, 65 L. ed. 720), decided that Newton was entitled to a patent on his homestead entry under the proviso to section 7 of the act of March 3, 1891, 2 years having elapsed from the date of the issuance of the receiver's final receipt upon final entry, and there being no contest or protest pending against the validity of the entry, but stated that the purpose of the statute was:

"To require that the right to a patent which for 2 years has been evidenced by a receiver's receipt, and at the end of that period stands unchallenged, shall be recognized and given effect by the issue of the patent without further waiting or delay, and thus to transfer from the land officers to the regular judicial tribunals the authority to deal with any subsequent controversy over

the validity of the entry, as would be the case if the patent were issued in the absence of the statute."

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in concluding that the jurisdiction to determine whether the action of the Land Office set forth in its decision of April 3, 1963, amounted to a protest within the meaning of Title 43 U.S.C. § 1165, has been exclusively delegated to the Secretary of the Interior.

2. The District Court erred in concluding that the Court is without jurisdiction to determine whether the action of the Land Office on April 3, 1963, constituted a protest.

3. The District Court erred in failing to conclude that the action of the Land Office on April 3, 1963, did not constitute a protest.

4. The District Court erred in failing to conclude that even if the action of the Land Office on April 3, 1963, constituted a protest, no contest or protest was pending at the time appellants filed this action.

5. The District Court erred in failing to conclude that it was not necessary for plaintiffs to have exhausted their administrative remedies prior to filing this action, or in the alternative, that appellants did exhaust their administrative remedies prior to the filing of this action.

6. The District Court erred in failing to conclude that appellants are entitled to patents for the whole of their Desert Land entries.

7. The District Court erred in entering judgment dismissing appellants' complaint.

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction to review a determination by the Secretary of the Interior of whether a protest or contest has been instituted within the statutory period or of whether a contest or protest is pending at the expiration of the statutory period.

2. What are the circumstances under which such jurisdiction should be exercised?

3. Did the April 3, 1963, action of the Riverside Land Office (Exh. C) constitute a "protest" within the meaning of 43 U.S.C. § 1165, and if it did, was it "pending" at the time appellants filed their complaint in the district court?

4. Whether appellants were required to exhaust their administrative remedies before going into the District Court, and if so, whether appellants did so.

SUMMARY OF ARGUMENT

The terms "contest or protest" as used in 43 U.S.C. § 1165 do not mean action of any kind. They mean lawful action. The April 3, 1963, action by the Riverside Land Office (Exh. C) was not lawful action for two reasons. First, it was not authorized by the regulations of the Department of the Interior. Second,

due process of law required a hearing, and appellants were deprived of one. Even if the April 3, 1963, action was lawful action, it was no longer pending when appellants filed their complaint in the District Court. The refusal by the Secretary to issue patents to appellants is an arbitrary one and the Court has jurisdiction to compel the Secretary to do so. No exhaustion of administrative remedies is required because the issue involved is one of law and does not call for the exercise of administrative discretion. To the extent that exhaustion of remedies is required, appellants have met that requirement.

ARGUMENT

I. THE APRIL 3, 1963, ACTION BY THE LAND OFFICE WAS NOT LAWFUL ACTION.

A. The April 3, 1963, action was not authorized by the regulations of the Department of the Interior.

"Contest and Protest Proceedings" in the Department of Interior are governed by the provisions of 43 CFR, Subpart 1852.

It is important to note at the outset that the provisions of 43 CFR, Subpart 1852, are the provisions which were in effect (a) at the time appellants filed the final proofs for their desert land entries and (b) at the time appellants filed their complaint in the District Court.

Subpart 1852 has two divisions.

The first division, 1852.1, is entitled "Private Contests and Protests" and has grouped under it Sections 1852.1-1 through 1852.1-8.

Section 1852.1-1 states that "any person who claims title to or an interest in land adverse to any other person . . . may initiate proceedings" and "such a proceeding will constitute a private contest". Sections 1852.1-3 to 1852.1-8 require a complaint, an answer, and a notice of hearing, and provide for an adversary-type hearing before an impartial Hearing Examiner.

Section 1852.1-2 states that where the elements of a contest are not present, the objection raised will be considered a "protest" and "such action thereon will be taken as is deemed to be appropriate in the circumstances".

The second division, 1852.2, is entitled "Government Contests".

Section 1852.2-1 provides that "the Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim". Sections 1852.2-2, et seq., require a complaint, an answer and a notice of hearing, and provide for an adversary-type hearing before an impartial Hearing Examiner.

There is no provision for a government "protest".

In summary, objections by private persons may be raised by contest or by protest. Objections by the government may be raised *only by contest.*

The regulations of the Department of the Interior bind both the Secretary and the entryman. As stated by the Court of Appeals for the District of Columbia in *Sheridan Wyoming Coal Co. v. Krug,* 172 F. 2d,

282, 287 (C.A. D.C. 1949) construing a regulation of the Department of Interior regarding the leasing of federal coal lands:

> "The regulation was published in the Federal Register as one of general application and legal effect. It had the force and effect of statute. As such, it was binding upon the Secretary until repealed or modified by him."

See also 44 U.S.C., § 305 (a), and *Pan American Petroleum Corp. v. Pierson,* 181 F. Supp. 557, at 563 (D.C. Wyo. 1960. *Cf., Miller v. Commissioner,* 333 F. 2d 400 (C.A. 8 1964), and *McCord v. Granger,* 201 F. 2d 103 (C.A. 3 1952), dealing with regulations of the Treasury Department.

Appellee has never filed a contest against appellants' entries. The so-called "protest" action taken by him through the Riverside Land Office on April 3, 1963, neither was nor is authorized by the Department's regulations.

B. "Contest and Protest" as used in 43 C.F.R., Subpart 1852, are the same as "contest or protest" used in 43 U.S.C. §1165 and 43 C.F.R. 1862.6.

On page 4 of his Memorandum Opinion (R. 42) the district judge notes that a contest was not filed against appellants' entries. He also recognizes that 43 C.F.R. 1852.2 makes no provision for or reference to government protests. He apparently concludes, however, that as used in 43 U.S.C. § 1165 and its corresponding regulation, 43 C.F.R. 1862.6, supra, "protest" has a different meaning. The conclusion is not sound.

43 C.F.R. 1852.2 and 43 C.F.R. 1862.6 are upon the same subject matter: Management and disposal of the public lands. Both regulations are found in 43 C.F.R. —Public Lands: Interior; Chapter II—Bureau of Land Management; Subchapter A—General Management; and Group 1800—Public Administrative Procedures.

It is well-settled rule of construction that statutes upon the same subject matter must be construed together. (50 *Am. Jur.* § 348, pp. 343-345.)

It is equally well-settled that a statute must be read and construed as a whole in harmony with other statutes relating to the same subject matter. (50 *Am. Jur.* § 363, pp. 367-369.)

The question of what is meant by a "pending contest or protest" under 43 U.S.C. § 1165 and 43 C.F.R. 1862.6 is answered by 43 C.F.R. 1852.1 and 1852.2 The focal point is 43 C.F.R. 1852.1 and 1852.2 as they read at the time of filing of appellants' final proofs and now.

C. The April 3, 1963, action by the Riverside Land Office deprived appellants of due process of law.

A pertinent portion of a letter from the Department of the Interior, Office of the Secretary, to the Chairman, Subcommittee on Public Lands, Committee on Interior and Insular Affairs, U. S. Senate, dated July 5, 1963, found at pp. 177-179 in the report entitled "Public Land Review: Hearings on S. 758: Eighty-Eighth Congress" (U.S. Govt. Printing Office, 1963), states as follows (emphasis supplied):

"Preliminary to dismissing the question of the finality of examiner's decisions, it is helpful perhaps to set out the classes of land cases in which hearings before hearing examiners are held in accordance with the Administrative Procedure Act (5 U.S.C., 1958 ed., sec. 1001 et seq.). In addition to hearings on appeals in grazing cases, these cases involve contests, both private and Government, against mining claims and homesteads and desert land entries. In grazing cases the statutory hearing before an examiner ordinarily takes place on appeal after the initial adjudication by local officers of the Bureau of Land Management. *In contest cases, on the other hand, the hearing precedes the initial decision in the case.* However, in those grazing cases where there appear to be repeated or willful violations by a licensee or permittee, notice is served on the alleged violator and a hearing is held before a decision is made on the alleged violations.

"Viewing the question as limited to examiners' decisions in grazing cases, we are unable to perceive a logical distinction for drawing the line. If the suggestion is that examiners' decisions in all cases should be made final, a number of problems arise.

"*First, where 'due process' requires a hearing, and in our view that is true of the classes of cases we are here concerned with (United States v. O'Leary et al.,* 63 I.D. 341 (1956); *E. L. Cord dba El Jiggs Ranch,* 64 I.D. 232 (1957); see *Johnnie E. Whitted et al.,* 61 I.D. 172 (1953)), *the hearings must be and are held in accordance with the provisions of sections 7 and 8 of the Administrative Procedure Act.* So far as here ma-

terial, these sections grant parties broad rights of administrative review. The procedure suggested by the question would eliminate those rights."

It has long been true that in administrative proceedings of a quasi-judicial character, the interests of a citizen must be protected by the rudimentary requirements of fair play. These demand a fair and open hearing. Failure to afford the opportunity for a hearing is more than a procedural irregularity. It is a vital defect.

Morgan v. U. S., 304 U.S. 1 at pp. 14 and 22, 58 S. Ct. 773, 776, 999, 1001.

The land department has no power to strike down any claim arbitrarily. "Due process in such case implies notice and a hearing".

Best v. Humboldt Placer Mining Co., 371 U.S. 334 at p. 337, 83 S. Ct. 379, 9 L. Ed. 2d 350 (1963).

In his treatise Professor Davis states:

"The conclusion seems rather fully supported that a party who has a sufficient interest or right at stake in a determination of governmental action should have an opportunity for a trial type of hearing on issues of adjudicative facts".

He further concludes:

"When adjudicative facts are in dispute, our legal tradition is that the party affected is entitled not only to rebut or explain the evidence against him but also to 'confront his accusers' and to cross-examine them".

1 Davis, *Administrative Law,* p. 426.

The April 3, 1963, action was taken *ex parte,* without prior notice to appellants, and without a hearing. It was arbitrary in every sense. This was recognized by the Secretary in his decision of February 3, 1965 (Exh. E), at which time he "set aside" the earlier decisions and remanded the case "for initiation and prosecution of a contest".

I. THERE WAS NO "CONTEST OR PROTEST" PENDING WHEN APPELLANTS FILED THEIR COMPLAINT IN THE DISTRICT COURT.

Even if the April 3, 1963, action by the Riverside Land Office was lawful action, it still appears that no "contest or protest" was pending against appellants' entries on May 13, 1965, the date appellants filed their complaint in the District Court.

Appellee's February 3, 1965, decision states that "the Bureau *should initiate* contest proceedings against the entries to the extent to which they are believed to be invalid. Upon the filing of a proper and timely answer by the Zwangs, the cases will proceed to a hearing in accordance with the Department's contest procedures. 43 CFR, Subpart 1852." (Exh. E, p. 2; emphasis supplied.) "Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a); 24 F.R. 1348), the decision appealed from is set aside and the case is remanded *for the initiation and prosecution* of a contest against each entry as provided in this decision." (Exh. E, p. 3; emphasis supplied.)

The point is, the initiation of contests four year
after the date of the receipt is barred. 43 U.S.C. § 116
provides that "after the lapse of two years from th
date of the issuance of the receipt" and "when ther
shall be no pending contest or protest", patent shal
issue.

A good illustration is the decision of the Minnesot
Supreme Court in *Everett v. Wallin,* 184 N. W. 95
(1921).

In *Everett v. Wallin,* Everett's predecessor in in
terest was an entryman. The following events too
place:

1. *August 17, 1906:* The receipt was issued to th
entryman.

2. *November 23, 1906:* Wallin filed a private co
test.

3. *December 11, 1906:* Wallin's contest was re
jected by the General Land Office. The case was re
ferred to a government special agent for investigatio
of possible fraud by the entryman.

4. *February 11, 1907:* Another private contest wa
filed.

5. *June 16, 1907:* The second contest was suspende
pending an investigation of the entry on behalf o
the government.

6. *February 24, 1908:* A third private contest wa
filed.

7. *June 3, 1908:* The second contest was permitte
to proceed.

8. *February 4, 1909:* The second contest was dismissed for want of prosecution.

9. *April 29, 1909:* The third contest was denied.

10. *June, 1909:* The government filed a contest.

The government's contest resulted in cancellation of the entry. After the cancellation, Wallin, who had been the first contestant, took up the entry and later obtained a patent to it.

Everett, the successor of the original entryman, filed an action in a Minnesota Court, claiming that when on April 29, 1909, the third contest was denied, more than two years had elapsed from the date of the receipt; there was no contest or protest pending after the April 29, 1909, decision was made; the entryman was entitled to patent at that time, and the June, 1909, government contest proceedings were barred by 43 U.S.C. § 1165 and were a nullity. Everett asked the Minnesota Court to quiet his title against Wallin. The Minnesota Court did so.

II. THE DISTRICT COURT HAD JURISDICTION TO GRANT PLAINTIFFS' REQUEST AND SHOULD HAVE DONE SO.

The United States Supreme Court has ruled in this area on four occasions: *United States ex rel. Champion Lumber Co. v. Fisher,* 227 U.S. 445, 33 S. Ct. 329, 57 L. Ed. 591 (1912); *Lane v. Hoglund,* 244 U.S. 174, 37 S. Ct. 558, 61 L. Ed. 1066 (1917); *Payne v. Newton,* 255 U.S. 438, 41 S. Ct. 368, 65 L. Ed. 720 (1920); and *Stockley v. U. S.,* 260 U. S. 532, 67 L. Ed. 390 (1923). The *Champion Lumber Co.* and *Lane*

cases probably are the leading ones. *Payne* and *Stockley* follow *Lane*.

In *Champion Lumber Co.,* the receiver's receipt was dated September 24, 1902. In November, 1902, the Commissioner of the General Land Office (the predecessor of today's Director of the Bureau of Land Management) received official reports indicating fraud on the part of the entryman. The entry was suspended pending further investigation. Further investigation was made, but it was not until 1906 that the Commissioner ordered a proceeding to be commenced against the entry. Notice was given and a hearing was held. As the result of the hearing, the entry was cancelled.

The entryman then filed an action in the Supreme Court of the District of Columbia, relying on 43 U.S.C. § 1165, to obtain a Writ of Mandate requiring the Secretary of the Interior to issue a patent for the land involved. The entryman's petition was dismissed in the Supreme Court of the District of Columbia. The dismissal was affirmed by the Court of Appeals for the District of Columbia. (39 App. D.C. 158.) In its opinion the United States Supreme Court declines to review the ruling of the Court of Appeals. The opinion stresses Section 250 of the Judicial Code of 1911, regulating review by the United States Supreme Court of Judgments of the Court of Appeals for the District of Columbia, but it also contains language to the effect that the determination of what constitutes a protest within the meaning of 43 U.S.C. § 1165 is a matter to be decided by the Secretary of the Interior, not by the Courts.

In *Lane,* during the two years after the issuance of the receipt, a forest officer reported that the entryman had not established or maintained a residence upon the land claimed by him, as the law required. After the expiration of the two years, the Commissioner of the General Land Office ordered a proceeding to be commenced in the local Land Office against the entry. Notice was given and a hearing was held. The local Land Office and the Commissioner found in favor of the entryman. However, the Secretary of the Interior found against the entryman and directed that the entry be cancelled. The entryman then filed a petition in the federal Court for a Writ of Mandate, on the basis of the provisions of 43 U.S.C. § 1165.

The question in *Lane* was whether the forest officer's report during the two years was a contest or protest within the meaning of 43 U.S.C. § 1165. The entryman contended that it was not. The Secretary of the Interior contended that it was.

The Supreme Court undertook to decide the question. It decided that the forest officer's report was not contest or protest, and directed the issue of patent.

The facts in *Champion Lumber Co.* and in *Lane* are strikingly similar. The results are different.

It is submitted that although *Lane* does not expressly overrule *Champion Lumber Co.,* it does so by clear implication. *Lane* stands for the proposition that what is a "contest or protest" within the meaning of 43 U.S.C. § 1165 is a matter for judicial inquiry. What is involved is construction of a statute. Statutory construction is not an exercise of administrative

judgment or discretion. (*Udall v. Wisconsin, Colorado and Minnesota,* 306 F. 2d 790, at 793 (C.A. D.C. 1962).)

The district judge resolved the conflict between the two cases by stating in his Memorandum Opinion (R. 42) as follows:

> "When the Lane case, supra, is read with the Champion Lumber Co. case, supra, it appears that the determination of whether a protest or contest has, in fact, been instituted, within the statutory period, lies within the discretion of the Secretary unless his conclusion can be said to be capricious or arbitrary or so unreasonable as not to be tenable."

Assuming *arguendo* that the district judge is correct, it still follows that the relief prayed for should be granted in the present case.

As has been pointed out, the "action" of April 3, 1963, was unquestionably arbitrary in that it neither was nor is authorized by the pertinent regulations, and was taken *ex parte,* without prior notice, and without a hearing. It is hard to conceive of anything more arbitrary. There is a good statement of this in the recent case of *Stewart v. Penny,* 238 F. Supp. 821, at 827 (D. Nev. 1965):

> "The omnipotence of the Department of the Interior as guardian of the public domain is exhibited when the Department acts affirmatively and grants patents under the public land laws. The converse is not true. An entry or application for patent which is contested or rejected by the Secretary presents issues regarding the legal

rights of the entryman under the public land laws. These are rights established by Congress which the Secretary of the Interior may not arbitrarily or capriciously ignore and which must be determined within the due process safeguards of the Administrative Procedure Act.

"Subordinately, the Government argues that the hearing held on Stewart's application was not a hearing required by statute within the meaning of the Administrative Procedure Act and that the Act, therefore, does not apply. This we cannot accept. The Administrative Procedure Act applies to 'each authority of the Government of the United States', not expressly excepted (5 U.S.C. § 1001). Adams v. Witmer (9 CCA 1958), 271 F. 2d 29, is direct authority for its applicability to the Secretary of the Interior."

Defendant's refusal on March 5, 1965, to issue patents (Exh. G), can not be viewed in a vacuum. It states that "the Land Office decision of April 3, 1963, was a protest action that would toll the two year patent entitlement period, as it was taken within the two year period". If as is contended, the April 3, 1963, action was arbitrary and capricious, the March 5, 1965 refusal, which is based on it, is no less arbitrary or capricious.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT REQUIRED; AND IF REQUIRED, PLAINTIFFS HAVE DONE SO.

In *Lane v. Hoglund,* supra, the entryman sought judicial relief on the basis of 43 U.S.C. § 1165 as soon as his entry was cancelled because allegedly he did not maintain a residence on it. In the words of the United States Supreme Court, "the present petition was then filed". The Court's opinion makes it clear that if at the expiration of two years there is no "pending contest or protest", the Secretary of the Interior has no discretion or judgment to exercise. He can do but one thing, issue a patent, and the act he is called upon to perform is a ministerial one.

The provisions of 43 C.F.R. 1862.6 bear this out. The regulation quotes from *Payne v. Newton,* supra, and says that the purpose of 43 U.S.C. § 1165 was to transfer from the land officers to the regular judicial tribunals after the passing of the specified two year period, the authority to deal with any subsequent controversy over the validity of the entry.

Also as noted early in this brief, there are no questions of fact involved in this case. The only questions are of law.

Prior administrative adjudication is not required for controversies which involve issues of law and do not involve issues essentially of fact or call for exercise of administrative discretion.

> *Gt. Northern Ry. Co. v. Merchants Elev. Co.,* 259 U.S. 285, at p. 291, 42 S. Ct. 477, 66 L. Ed. 943;

Pan American World Airways v. Boyd, 207 F. Supp. 152, at p. 160 (D. of C., 1962);
S.S.W. v. Air Transport Assn., 91 F. Supp. 269, at p. 270 (D. of C., 1950).

The rule just stated is applied and followed in the recent decision in *Greene v. United States,* 376 U.S. 149, 84 S. Ct. 615, 11 L. Ed. 2d 576 (1964).

Statutory construction is not an exercise of administrative judgment or discretion. (*Udall v. Wisconsin, Colorado and Minnesota,* supra.)

In any event appellants have already treaded their way through the tortuous paths of the administrative hierarchy. They did so in order to obtain a determination that the April 3, 1963, action was a nullity.

In this regard, the decision of the Riverside Land Office dated May 8, 1962 (Exh. A), concludes with the words, "the right of appeal is allowed . . .". It was appealed. The April 3, 1963 action of the same office (Exh. C) says that "Elodymae Zwang and Darrell Zwang are allowed the right of appeal . . .". It was appealed. The decision of the Bureau of Land Management dated October 23, 1963 (Exh. D), affirming the April 3, 1963, action, concludes with the same language. It was appealed, and on February 3, 1965, was "set aside" and "remanded for the initiation and prosecution of a contest". (Exh. E.)

The March 5, 1965, refusal to issue patents (Exh. G), contains no such language. It states: "It is assumed that this matter was reviewed by the Secretary when decision A-30201 was being considered". The

Secretary has already reviewed the matter. There is no reason to ask the Secretary to do something he has done already.

CONCLUSION

It is submitted that the judgment of the District Court should be reversed and the case remanded with instructions to the District Court to enter judgment as prayed for in appellants' amended complaint. Approximately five years have elapsed since May, 1961, when appellants filed their final proofs and received receipts. The government has yet to commence a proceeding against appellants' entries of a kind either authorized in the government's regulations or meeting basic standards of due process.

Dated, Coalinga, California,
May 2, 1966.

FRAME & COURTNEY,
TED R. FRAME,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

TED R. FRAME,
Attorney for Appellants.

(Appendix Follows)

Appendix.

Appendix

TABLE OF EXHIBITS

Exhibit	Record Page	Transcript Pages
Joint #A (Land Office Decision)	Attached to Pre-Trial Conference Order	.....*
Joint #B (B.L.M. Decision)	Attached to Pre-Trial Conference Order	.....
Joint #C (Land Office Decision)	Attached to Pre-Trial Conference Order	.....
Joint #D (B.L.M. Decision)	Attached to Pre-Trial Conference Order	.....
Joint #E (Secretary of Interior Decision)	Attached to Pre-Trial Conference order	.....
Joint #F (Letter to Department of Interior)	Attached to Pre-Trial Conference Order	.....
Joint #G (Reply to letter)	Attached to Pre-Trial Conference Order	.....

*No reporter's transcript involved.